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THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
BEFORE THE WATER COUNCIL

04-18 WC

IN RE: THADDEUS DYMON  
WATER DIVISION DECISION DATED SEPTEMBER 10, 2004  
ON REQUEST FOR WAIVER OF RESTRICTIONS FOR GILMAN POND, UNITY

RECEIVED

NOTICE OF APPEAL

OCT 08 2004

This is an appeal of the findings and decision of the Water Division of the Department of Environmental Services (hereinafter "DES"), dated September 10, 2004, by Thaddeus Dymon of 13 Fairway Drive in Ludlow, Massachusetts 01056 (hereinafter the "Owner"), relating to property owned by the Owner at 307 Unity Springs Road in Unity, Sullivan County, New Hampshire (hereinafter the "Property"), by his counsel in this matter, Daniel G. Smith, Esq.

1. The Property consists of approximately 45 acres of land with a residence and barn, and is situated between Unity Springs Road and Gilman Pond. The Property has approximately 1,500 feet of shoreline frontage on the southerly end of Gilman Pond. The Owner, along with his brother, Edward Dymon, acquired title to the Property by Warranty Deed of Nancy Tassinari, dated May 25, 1978. Edward Dymon conveyed his one-half undivided interest in the Property to the Owner by Quitclaim Deed dated September 9, 2002, and recorded in Book 1326, Page 572 of the Sullivan County Registry of Deeds.

2. Gilman Pond is a water supply source for the Town of Newport. The Owner is the only private owner of land with frontage on Gilman Pond. The remainder of the shoreline is owned by the Town of Newport.

3. On June 4, 1997, DES adopted rules restricting activities upon Gilman Pond and the adjacent shoreline (Env-Ws 386.56, et seq.). Among other things, these rules prohibit swimming, fishing or boating in or upon Gilman Pond. Similar restrictions issued by predecessor state agencies have been in effect for some time predating the Owner's ownership of the Property.

4. By letter to the Water Division of DES dated June 1, 2004, the Owner requested a waiver of the above-described restrictions pertaining to Gilman Pond for the purpose of allowing swimming, boating and fishing in Gilman Pond by himself, his family, and guests.

5. By decision dated September 10, 2004, the Water Division of DES denied the Owner's waiver request, with the exception that land-based fishing from the shore of the Owner's Property was allowed. The Water Division found that a waiver to allow other recreational use such as swimming, water skiing, or boating would contravene the intent of the restrictions by exposing the drinking water supply to additional risk of waterborne contamination. A copy of the Water Division's Decision, dated September 10, 2004, is attached.

6. The Owner appeals from the Water Division Decision, and the basis for the Owner's appeal is set forth below.

#### **Basis of Appeal**

7. As the owner of shoreline on Gilman Pond, the Owner's littoral rights in connection with the use and enjoyment of that Pond are more extensive than those of one who is only a member of the public. Willis v. Wilkins, 92 N.H. 400, 403-404 (1943). The Owner's

rights are "unquestionably impaired" by the restrictions in question. *Id.* They result in a serious restriction of the Owner's private rights. Richardson v. Beattie, 98 N.H. 71, 77 (1953).

8. The authority of DES to promulgate rules restricting otherwise allowable recreational activities on water bodies rests on a factual determination that a public water supply "is being contaminated or is in danger of contamination." RSA 485:23.

9. Rules restricting use must be reasonable and based upon findings that specific recreational uses either have or will endanger the water supply. Richardson v. Beattie, 98 N.H. 71 (1953).

10. Upon information and belief, the Town of Newport maintains a water treatment facility near the dam on Gilman Pond. The dam is on the opposite end of the Pond from the Property. Upon further information and belief, the water from the Pond is treated by use of chlorine and a filtration system. Upon information and belief, chlorination "serves to render the water practically sterile" (see Willis v. Wilkins, 92 N.H. 400, 404 (1943)), and the existence and use of both chlorination and filtration effectively eliminate any danger of contamination that might occur from the Owner's recreational uses, especially if such use precluded gasoline motors on boats.

11. Any alleged causal relationship between the Owner's recreational use of Gilman Pond and the threatened contamination of the Pond asserted by the Water Division in support of their denial of a waiver of the restrictions is based solely upon speculation or policy, not factual findings.

12. Upon information and belief, no facts or scientific evidence exists indicating that the Owner's proposed use of Gilman Pond would result in contamination of the Pond. As such, a

complete restriction of activity on the Pond is unreasonable in light of the resulting serious derogation of private rights that results.

WHEREFORE, The Owner, Thaddeus Dymon, requests that the Water Division Decision dated September 10, 2004, be reversed and that the Owner be allowed recreational use rights on Gilman Pond, including swimming, boating and fishing.

Respectfully Submitted,

Thaddeus Dymon  
By His Attorneys,  
Law Offices of Daniel G. Smith,

Dated: October 8, 2004

By: \_\_\_\_\_

**COPY**  
Daniel G. Smith, Esq.  
23 Bank Street  
Lebanon, NH 03766  
(603) 448-3900

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of October, 2004, a true copy of the foregoing Notice of Appeal has been sent by U.S. First-Class Mail, postage prepaid, to Adele M. Fulton, Esq., Michael P. Nolin, Commissioner, DES, and to Harry T. Stewart, P.E., Director, DES Water Division.

**COPY**  
Daniel G. Smith, Esq.



The State of New Hampshire  
**Department of Environmental Services**



**Michael P. Nolin**  
Commissioner

September 10, 2004

Attorney Daniel G. Smith  
Law Offices of Daniel G. Smith  
23 Bank Street  
Lebanon, NH 03276

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SEP 13 2004

**Re: Request for Waiver of Restrictions for Thaddeus Dymon for Gilman Pond, Unity**

Dear Attorney Smith:

By letter dated June 1, 2004, representing Mr. Thaddeus Dymon of 13 Fairway Drive, Ludlow Massachusetts, you requested a waiver pursuant to Env-Ws 386.04 to allow swimming, fishing and boating by Mr. Dymon and others on Gilman Pond in Unity, New Hampshire. Gilman Pond is the Town of Newport's surface water supply reservoir. Mr. Dymon is an owner of land adjacent to Gilman Pond. Specifically, a waiver was requested of Env-Ws 386.56(h)(12) bathing, swimming and water-skiing; (14) tying, beaching or grounding of boats; and (18) boating and fishing in Gilman Pond.

Two additional letters were received concerning this request:

- A letter dated June 25, 2004 from Attorney Adele Fulton representing the Town of Newport; and
- A letter dated July 6, 2004 from you concerning the information in Attorney Fulton's letter.

**WAIVER REQUEST CRITERIA**

Under Env-Ws 386.04(b)(2), "a request for a waiver and determination of essential compliance shall include the following information:

1. A specific reference to the paragraph for which the waiver is sought.
2. A full explanation as to why the waiver is necessary.
3. A demonstration of hardship caused if the rule is adhered to.
4. A full explanation of the alternatives for which the waiver is sought with backup supporting data, and
5. A full explanation of how the granting of the waiver is consistent with the intent of RSA 485:24 and RSA 485:25 and would have a just result."

The Division finds that the information provided in your letter dated June 1, 2004 meets the minimum informational requirements to render a decision on the waiver request.

## DECISION CRITERIA

Under Env-Ws 386.04(b)(3), "The division shall approve a request for waiver upon finding that:

1. The proposal is at least equivalent to the specific requirement in the rule, or
2. If the proposal was not equivalent to the requirement contained in the rule, it shall be adequate to ensure that the intent of RSA 485:24 and RSA 485:25 is met."

Also, under Env-Ws 386.04(c), "no waiver shall be granted which, in the judgment of the division contravenes the intent of the rules."

## DECISION AND FINDINGS

The waiver request is **DENIED**, except that land-based fishing will be allowed from the Dymon property, based on the following findings:

1. The Division finds that no hardship has been demonstrated as required by Env-Ws 386.04(b)(2) to the extent that the rule should be waived.
2. The Division finds that the proposal is not equivalent to the specific requirements in Env-Ws 386.56(h), Protection of the Purity of Gilman Pond. Allowance of additional recreational use on Gilman Pond, including body contact recreation and boating, does not afford protection equivalent to the existing restrictions. This would also be inconsistent with well-recognized best management practices in the water works industry for water quality protection.
3. The Division finds that a waiver to allow body contact by swimming, waterskiing or other recreation on Gilman Pond would contravene the intent of the rule by exposing the drinking water supply to additional risk of waterborne contamination.
4. The Division finds that a waiver to allow boating on Gilman Pond would contravene the intent of the rule by exposing the drinking water supply to additional risk of waterborne contamination.
5. The Division finds that it is reasonable to allow land-based fishing from the shore of the Dymon property, which is located on the opposite end of the pond from Newport's water supply intake.
6. RSA 485:24, I, in part states that "In response to a petition, or upon its own motion, the department shall adopt such rules under RSA 541-A as it may deem best to protect the water or ice supply against dangerous contamination." The Division finds that the existing rule is deemed best to protect the water supply because the rule ensures the presence of multi-barrier protections advocated by the United States Environmental Protection Agency to ensure compliance with the

Safe Drinking Water Act and is consistent with the purpose of Env-Ws 386 and best management practices of the New England waterworks industry.

7. RSA 485:25 provides DES with authority to adopt rules pertaining to protection of purity of interstate waters at the request of adjoining states. Gilman Pond is not an interstate water. Accordingly, the Division finds that RSA 485:25 is not practically relevant to the rules pertaining to Gilman Pond and, therefore, is not a factor in this decision.

## DISCUSSION

1. Under Env-Ws 386.01, "the purpose of these rules is to recognize the importance of those surface water supplies that are used as sources of public water supply and to provide methods for reasonable watershed management so as to maintain high levels of water quality." The Division has concluded that current rules contained in Env-Ws 386.56(h) coupled with other existing protective measures by the Town of Newport, including land ownership, provide reasonable watershed management so as to maintain high levels of water quality for the reasons discussed below.
2. Gilman Pond, located in Unity, New Hampshire, is the water supply reservoir for the Town of Newport. The pond is approximately 68 acres in area. Most of the land surrounding the pond is owned by the Town of Newport for purposes of water supply protection. Only one property, owned by Mr. Dymon, located on the southern end of the pond is privately held.
3. Env-Ws 386.56(h), Protection of the Purity of Gilman Pond, in its current form has been in effect since June 4, 1997. Predecessor agencies, including the Water Supply and Pollution Control Commission and the State Board of Health, have had similar restrictions since at least 1899 for Gilman Pond.
4. By letter dated June 25, 2004 from its attorney, Adele Fulton, the Town of Newport has objected to approval of the requested waiver.
5. Env-Ws 386.56(h) is consistent with the best management practices and policies of the water works industry for protection of public water supplies. New England water works policy is presented in the December 1995 Final Revised Policy of the New England Water Works Association (NEWWA) entitled "Resolution & Policy Concerning Recreational Use of Public Water Supplies." In this policy, NEWWA states in part that "public water suppliers support the concept of multiple barrier protection of drinking water supplies to maximize public health by: 1. Source water protection, 2. Treatment, which may include filtration, 3. Preservation of finished water, 4. Monitoring, 5. Training and certification." Multiple barrier protection to ensure safe drinking water is also supported by the American Water Works Association (AWWA) and the US EPA. In the NEWWA policy, terminal and primary storage reservoirs are "*reservoirs and reservoir*

*system components providing principal and/or end storage of water prior to treatment and delivery of finished water to the distribution system.” The NEWWA policy further states “recreational use of terminal reservoirs and adjacent land is contrary to the basic function of furnishing safe, palatable water supply to customers and should be prohibited to the greatest extent possible, but, in no event should direct contact with the reservoir be allowed. In addition, activities allowed to occur on adjacent lands should prohibit contact with water in the reservoir.” NEWWA policy summarizes standard industry practice (best management practices) for New England water suppliers.*

6. Gilman Pond is a small (69 acres) primary storage reservoir as defined in the NEWWA policy. Env-Ws 386.56 (h), the DES rules for Gilman Pond, are consistent with NEWWA Policy for primary storage reservoirs.
7. Numerous other water suppliers in New Hampshire, through DES regulation, as well as in other New England states have restrictions as stringent as those in Gilman Pond on water supply reservoirs to protect and preserve drinking water quality, and which are consistent with NEWWA policy.
8. In New Hampshire, all 25 terminal reservoirs that are 160 acres or smaller prohibit swimming.
9. The American Water Works Association (AWWA) policy on “Recreational Use of Domestic Water Supply Reservoirs,” revised June 23, 1996, states in part that *“It should be recognized that uncontrolled recreational use of domestic water supply can result in deteriorated water quality which increases the potential for a waterborne disease to occur...The decision concerning recreation and the associated treatment should be made by utilities based on water quality concerns, on applicable laws and regulations, and on information provided by AWWA, the US Environmental Protection Agency and other organizations that conduct research and present technical reports. This information should be used to balance and assess public demand for greater utilization of water resources.”*
10. AWWA has published research on recreation use of terminal water supply reservoirs. For example, an article entitled “Predicted Public Health Consequences of Body-contact Recreation on a Potable Water Supply Reservoir” by Mic H. Stewart *et al.* was published in the *Journal of the American Water Works Association*, May 2002. This article described a study on the impacts of direct body contact recreational activities, including swimming and other on-water sports, on water quality. In part, the study concluded *“a modeling-based risk assessment was conducted to assess the potential public health consequences to downstream potable water users consuming water from this reservoir if BC (“direct body contact”) recreation was permitted. Results of the study indicated that the annual risk of waterborne illness would increase three times above background, despite conventional treatment. Moreover, the occurrence of high-loading pathogen events associated with BC recreation was observed to*




*significantly increase the daily risk of waterborne illness to downstream consumers."*

11. Water from Gilman Pond is treated by slow sand filtration and chlorination prior to delivery to the Town of Newport water system. Slow sand filtration coupled with watershed protection represents a system of multi-barrier protection consistent with water works industry best management practices and as advocated by USEPA. The presence of filtration does not eliminate the need for other protective measures but rather completes this protection system.
12. In a letter dated July 6, 2004, Attorney Smith cites Lake Massabesic, the City of Manchester's water supply source, and Canaan Street Lake, the Town of Canaan's water supply source, as examples of terminal water supply reservoir where recreation is allowed. However, Attorney Smith did not describe the restrictions that exist on these water supplies.
13. Under Env-Ws 386.47, Protection of the Purity of the Water of Lake Massabesic and its Tributaries, some recreation activities are allowed on Lake Massabesic. Boating, fishing and sailing are allowed on the eastern portions of the lake. However, no swimming is allowed anywhere on Lake Massabesic. Also no sailboats, such as "Sunfish", that are prone to tipping are allowed. Furthermore, no human activity whatsoever (no boating, fishing or swimming) is allowed within a restricted area in close proximity of the water supply intake. Lake Massabesic has a total lake area of approximately 2,569 acres. The fully-restricted area is approximately 620 acres, about one-quarter of the lake area and just less than 10 times the size of the 67-acre Gilman Pond. Even with this restricted area, the City of Manchester provides a more sophisticated level of treatment than Newport uses for Gilman Pond, thus maintains a higher level of protection for finished water quality.
14. Env-Ws 386.18, Protection of the Purity of Canaan Street Lake and Its Watershed, applies to the Town of Canaan's water supply. This lake has a size of approximately 290 acres, over four times that of Gilman Pond. Swimming, fishing and boating are allowed on the northern portion of the lake, away from the intake area, in recognition of historic practices on this lake. Similar to Lake Massabesic, no human activity whatsoever (including boating, swimming or fishing) is allowed in an area in the southernmost part of the lake near the water supply intake (approximately 20 acres in this case). This is not an ideal situation for a terminal water supply reservoir. Less-than-ideal practices continue on Canaan Street Lake and some other water supply reservoirs in New Hampshire in recognition of historic recreation practices on these reservoirs. This is effectively equivalent to the allowance of "grandfathered" activities for other environmental programs such as the Shoreland Protection Act and should not be considered the "default" to weaken restrictions on other terminal reservoirs which have maintained more stringent restrictions that are consistent with standard industry practice in New England.

15. In New Hampshire, boating is prohibited on the entire waterbody for the majority (19 of 25) terminal water supply reservoirs with surface areas of less than 160 acres (see Env-Ws 386). Boating increases risk of contamination by increasing the potential for human contact with the water.
16. Boating also increases the risk of contamination by gasoline constituents. In some terminal water supply reservoirs, including Lake Massabesic, low levels of methyl tertiary butyl ether (MtBE) have been detected, particularly in the summer months, with the source being outboard motors. MtBE at the levels typically detected would not be expected to be removed by Newport's slow sand filtration process but are removed by the City of Manchester's treatment plant.
17. The Dymon property is the sole privately-held property on Gilman Pond, with most property controlled by the Town of Newport. This property is located on the southern side of the pond, away from the water supply intake. Shoreline fishing from this one property carries minimal risk of contamination to Newport's water supply. Consequently, the Division has concluded that it is reasonable to grant the requested waiver for land-based fishing from the Dymon property.

Under Env-WC 203, any aggrieved party may appeal this decision to the Water Council. Any appeal must be filed with the Water Council within 30 days.

Sincerely,  
  
Harry T. Stewart, P.E.  
Director, Water Division

cc: Mr. Thaddeus Dymon  
Daniel P. O'Neill, Town of Newport  
Adele Fulton, Esq.  
Michael P. Nolin, DES Commissioner  
Michael J. Walls, DES Assistant Commissioner  
Paul Susca and Sarah Pillsbury, DES